

THE HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TIMOTHY DIETZ,

Plaintiff,

v.

QUALITY LOAN SERVICE CORP. OF
WASHINGTON; WELLS FARGO HOME
MORTGAGE; WELLS FARGO BANK,
N.A.; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.; DOE
DEFENDANTS 1-20,

Defendants.

No. 13-05948-RJB

**REPLY IN SUPPORT OF WELLS
FARGO AND MERS'S MOTION TO
DISMISS**

Noted for consideration:
December 20, 2013

I. INTRODUCTION

Defendants Wells Fargo and MERS respectfully submit this reply in support of their Motion to Dismiss ("Motion") (ECF No. 6). Plaintiff Timothy Dietz belatedly filed his Response to Wells Fargo and MERS Motion to Dismiss ("Response") one day before the noting date of the Motion (ECF No. 11).¹

II. REPLY

A. Dietz's Procedural Arguments are Unavailing.

Dietz claims that he wants to amend his Complaint because the Complaint "is incomplete and needs to be amended." Resp. ¶ 3, ECF No. 11. However, it is now the noting

¹ "Wells Fargo" is, collectively, Defendant Wells Fargo Home Mortgage and Defendant Wells Fargo Bank, N.A. "MERS" is Defendant Mortgage Electronic Registration Systems, Inc. "Dietz" is Plaintiff Timothy Dietz.

1 date of the Motion and no amended complaint has been filed or served. In the absence of any
 2 actual information that might support amendment of the Complaint, the Motion is ripe for
 3 adjudication and should be granted.

4 Dietz claims that the Motion should not be heard as the Defendants have not been
 5 properly served. Resp. ¶¶ 1-2, ECF No. 11. However, Wells Fargo and MERS have consented
 6 to the jurisdiction of this Court by appearing and defending against Dietz's claims. Dietz's own
 7 failure to formally serve Wells Fargo and MERS should not be a bar to ruling on whether the
 8 Complaint passes the Rule 12(b)(6) standard.

9 Dietz criticizes Defendants' citation of *Call v. Routh Crabtree Olsen, P.S.*, claiming the
 10 case is inapplicable here because it is an unlawful detainer case. See Resp. ¶ 10, ECF No. 11
 11 (citing Case No. 13-5241 RJB, 2013 WL 3805651, * 4, 6 (W.D. Wash. July 18, 2013)).
 12 However, Defendants cite the case not for its facts but for its explanation of the futility standard
 13 when evaluating a motion to dismiss. Mot. 4, ECF No. 6. Indeed, as in *Call*, this case should
 14 be dismissed as against Wells Fargo and MERS with prejudice because any amendment of
 15 Dietz's claims against these defendants would be futile.

16 **B. Dietz Fails to Save his FDCPA Claims.**

17 Dietz cites *Jara v. Aurora Loan Services, LLC*, No. C 11-00419, 2011 WL 6217308, at
 18 *4 (N.D. Cal. Dec. 14, 2011) for the proposition that "acts taken in furtherance of a foreclosure
 19 proceeding can be the basis of a FDCPA claim." Resp. ¶ 6, ECF No. 11. However, the *Jara*
 20 court **granted** defendants' motion to dismiss, stating:

21 Acts required to institute foreclosure proceedings, such as the recording of a
 22 notice of default, alone, are not debt collection activities for purposes of the
 23 FDCPA unless alleged in relation to a claim for violation of 15 U.S.C. §
 1692f(6).

24 *Jara*, 2011 WL 6217308 at *5. Indeed, this is the very case Wells Fargo and MERS cite in their
 25 Motion for the proposition that Dietz's FDCPA claims fail as a matter of law. Mot. 8, ECF No.
 26 6. The holding of *Jara* does not save Dietz's FDCPA claims and the claims should be
 27 dismissed with prejudice.

1 Dietz argues that Wells Fargo and MERS's argument, if accepted, "would create an
 2 enormous loophole in the [FDCPA] immunizing any debt from coverage if that debt happened
 3 to be secured by a real property interest and foreclosure proceedings were used to collect the
 4 debt." Resp. ¶ 7, ECF No. 11. However, Defendants are not arguing that non-judicial
 5 foreclosure can never give rise to an FDCPA claim. Rather, Defendants argue (1) they are not
 6 "debt collectors" under the Act and so cannot be liable thereunder; and (2) to the extent non-
 7 judicial foreclosure activities are violation of the FDCPA, such claim must be brought under 15
 8 U.S.C. § 1692f(6), which Dietz fails to do. Mot. 5-9, ECF No. 6.

9 Dietz's attempts to distinguish *Lamb v. Mortgage Electronic Registration Systems, Inc.*,
 10 on the ground that the case does not involve a debt transferred while in default. See Resp. ¶ 11,
 11 ECF No. 6 (citing Case No. C10-5856RJB, 2011 WL 5827813, *5 (W.D. Wash. Nov. 18,
 12 2011)). However, Defendants cite this case for the general proposition that lenders are not debt
 13 collectors under the FDCPA and as such the case is applicable here. Mot. 5, ECF No. 6.

14 Moreover, Dietz fails to rebut the argument that his own facts show that Wells Fargo
 15 purchased the subject loan in 2008, soon after origination and before Dietz defaulted. See *id.* at
 16 6. Since Wells Fargo acquired its interest in the loan before default, it is not a debt collector
 17 under the FDCPA and cannot be liable for violation of the same. *Perry v. Stewart Title Co.* 756
 18 F.2d 1197, 1208 (5th Cir. 1985).

19 Finally, even if Wells Fargo is a "debt collector" under the FDCPA (it is not), there is
 20 still no claim in the Complaint that supports an FDCPA claim against MERS.

21 All in all, Dietz's FDCPA claims fail because (1) Defendants are not debt collectors;
 22 and (2) non-judicial foreclosure activities are not violations of the sections of the FDCPA under
 23 which Dietz brings his claims. Accordingly, Dietz's FDCPA claims should be dismissed with
 24 prejudice.

25 **C. Dietz's Deed of Trust Act Claim is Barred by Waiver and is not Asserted Against**
 26 **Wells Fargo or MERS.**

27 Dietz argues that his Deed of Trust Act ("DTA") claim is not barred by waiver because

1 it is saved under RCW 61.24.127. Resp. ¶ 12, ECF No. 6. However, this statute only preserves
 2 post-sale claims that allege “failure of the trustee to materially comply with the provisions of
 3 this chapter.” RCW 61.24.127(1)(c) (emphasis added). Here, neither Wells Fargo nor MERS is
 4 the trustee of the subject deed of trust and so claims against them are not preserved under RCW
 5 61.24.127. See Compl. ¶ 20, ECF No. 1 (alleging Quality appointed as deed of trust trustee).
 6 Additionally, there are no allegations in the Complaint regarding Wells Fargo or MERS’
 7 material violation of the DTA. See Compl. ¶¶ 96, 103, ECF No. 1. Indeed, Dietz’s Response
 8 also fails to actually allege any material and wrongful DTA activities taken by Wells Fargo or
 9 MERS.

10 Dietz failed to bring his DTA claims in a timely manner. Further, the Complaint, by its
 11 own terms, only asserts the DTA cause of action against Quality. Accordingly, the DTA claims
 12 against Quality are no bar to dismissal of the Complaint with prejudice as to Wells Fargo and
 13 MERS.

14 **III. CONCLUSION**

15 For the reasons articulated in the Motion and supported herein, Dietz’s claims against
 16 Wells Fargo and MERS should be dismissed with prejudice.

17 DATED: December 20, 2013

18 LANE POWELL PC

19
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25 Attorneys for Defendants Wells Fargo Home
 26 Mortgage, Inc., Wells Fargo Bank, N.A., and
 Mortgage Electronic Registration Systems, Inc.

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I caused the foregoing document to be filed with the Clerk of the Court via the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the following persons:

Timothy Dietz
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timthepostman@yahoo.com

I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

SIGNED December 20, 2013 at Seattle, Washington

s/Debra Smith
Debra Smith